No. 91-7094

In The

Supreme Court of the United States

October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

v.

SAMUEL A. LEWIS, Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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STATUTES AND COURT RULES

Respondent properly concedes that the Court of Appeals erred at two key points in its analysis of this case.

First – unlike the Court of Appeals panel, which treated the *Godfrey* and *Clemons* issues as alternative grounds for its decision, *see* J.A. 128-31 – Respondent acknowledges that "if this Court finds reversible error under *either* of Richmond's arguments, the writ should issue and the case referred to the Arizona Supreme Court for further review." Resp. Br. 49 n.16 (emphasis added).

Second, Respondent confesses that the panel was incorrect in its crucial assumption that Arizona's death penalty statute does not require weighing of aggravating and mitigating circumstances. Resp. Br. 44-5.

In light of these two concessions – and the Court's recent opinions in *Stringer v. Black*, 112 S. Ct. 1130 (1992), *Sochor v. Florida*, 112 S. Ct. 2114 (1992), and *Espinosa v. Florida*, 112 S. Ct. 2926 (1992) – the conclusion would appear to be inescapable that the Court of Appeals decision must be reversed and Petitioner resentenced. In an attempt to escape that conclusion, Respondent presents a new and complex analysis of both the law and the facts of the case. Its efforts will not bear scrutiny.

I. RESPONDENT MISCHARACTERIZES THE ISSUE ARISING OUT OF THE ARIZONA SUPREME COURT'S "MINORITY"[1] OPINION WHICH DIRECTLY CONTRAVENES *GODFREY v. GEORGIA* AND *MAYNARD v. CARTWRIGHT.*

Respondent's principal tactic is to recast Petitioner's argument as one which seeks to have the Court create a new constitutional rule, so it can interpose a defense of nonretroactivity under *Teague v. Lane,* 489 U.S. 288 (1989). Resp. Br. 9-33. If it were necessary to do so, we would question the propriety of raising this issue at this late date.[2] But Respondent's argument is so transparently contrived, there is no reason to reject it on the basis of its procedural irregularity.

[1] This opinion was styled the "majority" opinion by the Arizona Supreme Court itself. Respondent more accurately calls it the "minority" opinion (but then unfairly faults the dissenting Judges in the Ninth Circuit for accepting the Arizona court's characterization). Resp. Br. 38 n.13. Rather than add to the confusion, in this Brief we will refer to the opinions by the name of their authors.

[2] No issue of retroactivity was raised at any stage of the proceedings below, including the several rounds of briefing in the Court of Appeals which postdated *Teague*. The issue was not mentioned in the Brief in Opposition, which alone should preclude its consideration here. *See Howlett v. Rose,* 496 U.S. 356, 381 (1990). Although the Court has, on occasion, considered retroactivity questions *sua sponte,* that does not mean that a party can interject it in a manner wholly inconsistent with the established rules of procedure; such an exemption from procedural regularity should extend only to jurisdictional questions, which *Teague* plainly is not. *See Collins v. Youngblood,* 497 U.S. 37, 110 S.Ct. 2715, 2718 (1990); *Williams v. Dixon,* 961 F.2d 448, 457-58 (4th Cir. 1992).

The short and complete answer to Respondent's *Teague* argument is that it is directed against a claim Petitioner has not made. Petitioner's submission is *not* "that it was error for two justices to consider . . . the aggravating circumstance of especially heinous after three justices found the circumstance did not exist." Resp. Br. 1. Petitioner's argument is rather that it was error for Justices Holohan and Hayes of the Arizona Supreme Court to rest their approval of Petitioner's death sentence on a construction and application of the "especially heinous, atrocious or cruel" aggravating circumstance that was federally unconstitutional under *Godfrey v. Georgia,* 446 U.S. 420 (1980), and *Maynard v. Cartwright,* 486 U.S. 356 (1988), *see* Pet. Br. 30-36, and that these two Justices' approval of the sentence was indispensable to its affirmance, *see* Pet. Br. 42-43. That argument is not dependent on the number of State Supreme Court Justices who disagreed with this constitutional error, but only on the fact that the error produced the votes necessary for affirmance. It is not a novel claim; it is the same claim made in *Godfrey* and *Maynard* themselves.

Respondent's arguments attempt to gloss over this by claiming that the disagreement among the Justices in the Arizona Supreme Court was simply about whether the predicates for a limiting construction of the "especially heinous" aggravating circumstance "existed factually in this case." Resp. Br. 24. The disagreement was over more than that. As Justice Cameron's opinion says, the issue was "the proper boundaries of the[ ] criteria" under which a "heinous" finding could be upheld. J.A. 93. Justice Holohan never says he finds one of the *Gretzler* criteria, as those criteria were written. That is the reason Respondent is forced to construct its elaborate framework

of implicit findings of presumably-utilized criteria. Resp. Br. 38-43. It would have been simple enough for Justice Holohan to say, "We find the defendant inflicted gratuitous violence on the victim," or "We find the defendant needlessly mutilated the victim's body," if that was what he meant. Instead, he said, "[T]he fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a *ghastly* mutilation of the victim." J.A. 87 (emphasis added). Both the language[3] and the logic[4] of this statement suggest it means what Justice Cameron thought it meant: that a murder could be found to be "heinous," regardless of who directly committed it and regardless of the intent with which it was committed,

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[3] This sentence in Justice Holohan's opinion, and the preceding paragraph, is striking in its use of the passive mode, and its strict neutrality with regard to the identity of the driver at the fatal moment: "the victim . . . *was run over* not once, but twice"; "the first run *by the vehicle* was over the victim's head"; "[t]he second run *of the vehicle* was over the body"; "the fact the victim . . . *was run over* twice . . . we find to be a ghastly mutilation". J.A. 86-87 (emphasis added). This language is wholly inconsistent with Respondent's argument that these Justices independently decided for themselves that Petitioner was the driver. Resp. Br. 40. So is the Arizona Supreme Court's announced unwillingness to decide credibility questions on appeal. *See State v. Smith*, 131 Ariz. 29, 638 P.2d 686, 700 (1981).

[4] As this passage suggests, the "gruesome" aspect of Mr. Crummett's death was the fact that his "skull was crushed"; the injuries to his torso broke his ribs but hardly caused bleeding. *See* J.A. 6-7, 16. It would be difficult to characterize that injury as a "mutilation," let alone a "ghastly" one. The injury to the head was certainly "ghastly"; but it was the first injury inflicted, and caused instant death (J.A. 6), just like the ghastly gunshot wounds in *Godfrey*.

simply because "the appearance of the victim . . . was 'ghastly.' " *See* J.A. 95.

The difference between that interpretation of this aggravating factor, and the one advocated by the remaining Arizona Justices, is more than just a matter of state law. It is the difference between adhering to a limiting construction which "focuses on the state of mind of the killer," and abandoning that construction in revulsion of "the appearance of the corpse." J.A. 95. As Justice Cameron pointed out, such an abandonment of a previously adhered-to limiting construction is what occurred, and what the Court held unacceptable, in *Godfrey v. Georgia*. *See Maynard v. Cartwright*, 486 U.S. at 363. But it is also what Justice Holohan's opinion did, despite that admonition. J.A. 95.[5]

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[5] Respondent's alternative suggestion that Justice Holohan may have considered "gruesomeness" as a non-statutory aggravating circumstance (Resp. Br. 25-26) is made from whole cloth, and based on a serious misrepresentation of Arizona law.

> Under Arizona's death penalty statute, the trial court may give aggravating weight only to that evidence which tends to establish the aggravating circumstances specifically enumerated in A.R.S. § 13-703(F)
>
> . . . .

State v. Atwood, 110 Ariz. Adv. Rep. 3, 1992 Westlaw 72290 (April 9, 1992). "In death penalty cases, the permissible aggravating circumstances which may be considered are set forth in A.R.S. § 13-703(F)." *State v. Beatty*, 158 Ariz. 232, 762 P.2d 519, 530 (1988). The State is "limited to the aggravating circumstances contained in" that section, *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253, 1257 (1978), and the consideration of "aggravating circumstances in addition to those in the statute [is] . . . clearly erroneous. . . . " *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, 895 (1980). Respondent's contrary account is based on incomplete quota-

Certainly, that reading of Justice Holohan's opinion is easier to square with its language, and with the Law of Parsimony, than Respondent's elaborate new theory of how Petitioner could be found to have "engaged in corpse mutilation." Resp. Br. 42-43. This theory – never offered to the jury or to any court before now – picks and chooses so many diverse bits of evidence, and builds so many inferences upon inferences, we cannot believe any rational fact finder would accept it as true, beyond a reasonable doubt. Certainly, none has – including, as far as we can tell, Justices Holohan and Hayes. Justices Cameron, Gordon, and Feldman make a contrary finding, that the evidence does *not* support such a theory. J.A. 94, 96. That majority determination that the evidence fails to show intent to mutilate or inflict "gratuitous violence" would appear to be the one that should be presumed correct under 28 U.S.C. § 2254(d). *Cf. Cabana v. Bullock*, 474 U.S. 376 (1986).

Respondent asks the Court to infer otherwise – to hold that because the constitution requires adherence to a limiting construction as written, all the state judges must be conclusively presumed to have adhered to them, and

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tions, taken out of contexts which were explicitly restricted to the consideration of mitigating factors. *See Richmond v. Cardwell*, 450 F. Supp. 519, 521 (D. Ariz. 1978); *State v. Brewer*, 170 Ariz. 486, 826 P.2d 783, 801 (1992); *State v. Lavers*, 168 Ariz. 376, 814 P.2d 333, 352 (1991); *State v. Rockwell*, 161 Ariz. 5, 775 P.2d 1069, 1078 (1989); *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020, 1033 (1981). Respondent's equation of aggravation and "rebuttal to mitigation" (Resp. Br. 26 n.8) misreads the law and makes no sense in cases such as this one, where there was no claim that the manner in which Bernard Crummett died constituted a mitigating factor.

to have made whatever fact findings would be necessary to support them. Such a notion would wish constitutional error out of existence, and contravene the many cases in which this Court has found it despite arguable ambiguities in the state court decisions.[6]

Obviously, state courts do sometimes fall into constitutional error. It is equally certain that individual state judges err, and their colleagues often register disagreement with the error. That is what happened here; nothing more or less. Justice Holohan's opinion failed to adhere to the principles of *Godfrey*, despite the efforts of the concurring and dissenting Justices to point that out. That left a constitutional flaw in this case which requires resentencing under *Clemons v. Mississippi*.

II. RESPONDENT WOULD HAVE THE COURT APPROVE APPELLATE SENTENCING DONE *SUB SILENTIO*.

Respondent's concession that Arizona's is a "weighing" capital sentencing statute (Resp. Br. 44-45) leaves it with no alternative but to argue that the concurring Justices did, in fact, conduct the kind of independent reweighing of aggravating and mitigating factors permitted by *Clemons v. Mississippi*, 494 U.S. 738 (1990). Respondent cannot deny that those Justices never said they were conducting such a reweighing in this case – or even

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[6] *E.g., Sochor v. Florida*, 112 S.Ct. at 2123; *Parker v. Dugger*, 111 S.Ct. 731, 740 (1991); *Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1990); *Cabana v. Bullock*, 474 U.S. at 389; *Godfrey v. Georgia*, 446 U.S. at 432; *Eddings v. Oklahoma*, 455 U.S. 104, 119 (1982) (concurring opinion of Justice O'Connor).

suggested that they were doing so, as the Mississippi court did in *Clemons*. *See* 494 U.S. at 751. Respondent therefore argues that the concurrence either joined in the independent review done by Justice Holohan's opinion, or conducted its own reweighing *sub silentio*. Resp. Br. 47-48.

The first of these suggestions cannot be squared with the language of either opinion. Justice Holohan's opinion quite clearly stated it was engaging in "independent review" of Petitioner's sentence. J.A. 88. But that review included, on the side of aggravation, the "heinousness" factor that Justice Cameron rejected as unconstitutional. *See* J.A. 89. Indeed, that factor was one of the two points Justice Holohan "[p]articularly . . . note[d]" in the penultimate sentence in this part of his opinion, before concluding, "The death sentence is appropriate in this case." J.A. 90. Justice Cameron may have concurred in the result affirming the death sentence, but he can hardly have joined in the weighing process that led up to it, in light of his expressed disagreement with one of the two main elements it involved. By the same token, in *Clemons* and *Sochor* the appellate courts plainly agreed with the result; but because they disagreed with the factors the lower courts considered in reaching it, this Court insisted that they set forth their own reasoning before it would accept their conclusion.

Respondent's second argument has somewhat more appeal. It is true that the Arizona Supreme Court has issued many opinions which expressly include an independent sentence review, some of which were written by Justice Cameron. The record is not quite as uniform as Respondent suggests, however. Arizona appellate review

practices in capital cases have developed through the caselaw; they are not defined by statute, and their contours have not always been clear. Only a relative handful of cases have involved the precise circumstances Justice Cameron addressed here: reversal of one of several aggravating circumstances, with no change in the mitigating circumstances to be considered. *See* Resp. Appdx. Table 5. Some of these decisions clearly reweigh, omitting the invalid aggravating factors. *E.g. State v. Steelman*, 126 Ariz. 19, 612 P.2d 475, 483 (1980). Others are more oblique, and leave it unclear whether reweighing was done. *See, e.g., State v. Tison*, 129 Ariz. 526, 633 P.2d 335, 353-54 (1981); *State v. James*, 141 Ariz. 141, 685 P.2d 1293, 1300 (1984). Some appear to give weight to the trial court's decision, despite its error on the aggravation issue. *E.g., State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020, 1035 (1981). In the rare case like this one, where the Arizona Justices disagree about the proper application of an aggravating factor, the concurring opinion has been silent about its theoretical basis. *See State v. Clark*, 126 Ariz. 428, 616 P.2d 888, 893 (1980). In sum, although the caselaw supports the contention that reweighing is the Arizona Justices' general practice, that is all it supports.

Moreover, the same cases that most clearly announce independent appellate reweighing carry the negative implication that this general practice was *not* followed by the concurring opinion in this case. That many Arizona opinions are explicit about the fact and nature of their independent sentence review underscores the silence of Justice Cameron's opinion in this respect, and logically suggests that he did not conduct such a review. *Cf.* Federal Rule of Evidence 803(7).

Under *Clemons'* analysis, Justices Cameron and Gordon were acting as the functional equivalent of sentencing judges. Having announced their disagreement with the trial judge and their appellate colleagues, it may be that they undertook their own thorough, *de novo* review of the propriety of Willie Richmond's sentence, balancing anew the mitigating factors against the aggravation they found. But it is equally possible that, as Justice Feldman believed, they simply concluded the "penalty can be supported by the record" (J.A. 100) in light of the remaining aggravating factors. This Court has repeatedly held that such circumstances compel a remand for resentencing to eliminate the

> "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S., at 605 . . . *Eddings*, 455 U.S., at 119 . . . (O'Connor, J., concurring). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett*, 438 U.S., at 605 . . . .

Penry v. Lynaugh, 492 U.S. 302, 328 (1989). *See Stringer v. Black*, 112 S.Ct. 1130, 1136-37 (1992); *Parker v. Dugger*, 111 S.Ct. 731, 739-40 (1991); *Clemons v. Mississippi*, 486 U.S. at 752.

To accept Respondent's argument would be to reverse these decisions, and to call into question the vitality of the Eighth Amendment requirement that the grounds for capital sentencing decisions be spelled out sufficiently to make " 'rationally reviewable the process for imposing a sentence of death.' " *Lewis v. Jeffers*, 110 S.Ct. 3092, 3099 (1990), quoting *Godfrey v. Georgia*, 446

U.S. at 428. Before *Clemons* and since, the Court has required "that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed." *Gardner v. Florida*, 430 U.S. 349, 361 (1977) (plurality opinion). In most Arizona cases, and particularly the more recent ones, that has been done; in this earlier and procedurally unusual one, it was not. The fact it is an aberration does not make it more acceptable.

CONCLUSION

For both these reasons, and for each of them, the judgment of the Court of Appeals must be reversed.

Respectfully submitted,

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